



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**  
**JUDICIAL REVIEW APPLICATION NO. 6 OF 2015**  
**IN THE MATTER OF MWEA IRRIGATION SETTLEMENT SCHEME**  
**ADVISORY SUB-COMMITTEE HEARING ON RICE HOLDING NO. 1972**  
**MWEA SECTION UNIT M15**  
**REPUBLIC.....APPLICANT**  
**VERSUS**  
**THE NATIONAL IRRIGATION BOARD.....1<sup>ST</sup> RESPONDENT**  
**MWEA IRRIGATION SETTLEMENT SCHEME.....2<sup>ND</sup> RESPONDENT**  
**AND**  
**FELICITA MICERE CUBI.....1<sup>ST</sup> INTERESTED PARTY**  
**SYMON MUTHEE CUBI.....2<sup>ND</sup> INTERESTED PARTY**  
**PETER MUTHIKE CUBI.....3<sup>RD</sup> INTERESTED PARTY**  
**AND**  
**CHUBI KANGANGI.....EX-PARTE APPLICANT**

**JUDGMENT**

**INTRODUCTION**

The application before me is the Notice of Motion dated 18<sup>th</sup> December 2015 brought under *Order 53 Rule 1, 2 & 3 C.P.R, Section 8 & 9 of the Law Reform Act*. The applicant is seeking the following orders:

*(1) That this Court be pleased to issue orders of Judicial Review in the nature of certiorari to remove to this Court and quash the decision of the Respondents dated 10<sup>th</sup> July 2015 in respect of rice holding number 1972 Mwea Section Unit M 15 an order of prohibition against the respondents prohibiting them from in any way unlawfully altering the ownership records in the Ex-parte Applicant's name in respect of Rice Holding Number 1972 Mwea Section Unit M 15.*

*(2) Costs of this application be provided for.*

That application is supported by the affidavit of the Ex-parte Applicant sworn the same date and grounds shown on the face of the said application. That application is strenuously opposed with replying affidavits and grounds of opposition.

**EX-PARTE APPLICANT'S CASE**

The Ex-parte Applicant states that he is the lawful tenant of the rice holding and that on 9<sup>th</sup> July 2015, he was summoned by the Scheme Manager Mwea Irrigation Settlement to appear before the Disputes Arbitration Committee where he learned that the Interested parties were

demanding a share of his rice holding. He informed them he could not agree and he was informed to await further communication. However, he later saw a stranger enter into his rice holding who informed him the Interested parties had leased part of it. He applied for injunction in Wangu'ru PMCC NO. 84 of 2015 where he learned that the Respondents had directed that his rice holding be divided into 3 portions being 1972 (A) 1972 (B) and 1972 (C). He stated that the award of the Arbitration Committee was ultra vires the rules and other laws governing the Irrigation Scheme.

### **RESPONDENTS CASE**

According to the Respondents, the Ex-parte Applicant was present and was given a fair hearing during the hearing. They stated that the rice holding was dealt with in accordance with the provisions of the **Irrigation Act** and the rules thereunder and that the rice holding in question was equitably distributed for the benefit of the dependants of the Ex-parte Applicant.

### **INTERESTED PARTIES CASE**

The interested parties stated that the entire suit is totally defective and offends the mandatory provisions of the law and that the same should be struck out. The Interested parties also contend that in July 2015, they received summons from Mwea Irrigation Scheme requesting their appearance and minutes were taken in the Manager's office. After discussion, it was resolved that the 1<sup>st</sup> Interested party holds 1.5 acres and the 3<sup>rd</sup> interested party holds 1.5 acres in trust of the 2<sup>nd</sup> family and that they were issued with the respective licenses.

### **ISSUES FOR DETERMINATION**

**(1) Whether this Court can issue the orders of certiorari as sought.**

**(2) Whether the Court can issue orders of prohibition.**

### **CERTIORARI**

Certiorari is an order setting aside a decision of an administrative body or tribunal. (Technically the record of the decision maker is removed to the Superior Court for purposes of quashing and expunging it from the record). An order for certiorari would be sought where a decision has been made unlawfully and the decision should be set aside. That was the holding in the decision by the Court of Appeal in the case of **Kenya National Examination Council Vs Republic Ex-parte Geoffrey Gathenji Njoroge & 9 others (1997) e K.L.R.**, where it was held as follows:

***“Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of Natural Justice are not complied with or for such like reasons”.***

**Article 50 (1) of the Constitution of Kenya, 2010** provides as follows:

***“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body”.***

According to the minutes of the Disputes Arbitration Committee held on 9<sup>th</sup> July 2015, it shows that the Ex-parte Applicant was present during the arbitration. At paragraph 4 of his supporting affidavit, the Ex-parte applicant himself admitted that he appeared before the Committee and learned that the interested parties were demanding a share out of his rice holding. That he did not agree with what they were demanding and was informed that that decision will be communicated. In my view, the Ex-parte Applicant was given an opportunity of being heard. In addition, I also note that previously, the rice holding in dispute belonged to Kangangi Mabuti (deceased) and upon his demise, the Court held that the Ex-parte Applicant be his legal successor. The evidence adduced by the parties before the Arbitration Committee indicated that the Ex-parte Applicant has two (2) wives and that the 1<sup>st</sup> wife had lodged a complaint that she was being discriminated by being denied access to cultivate on the rice holding. After arbitration the dispute between the two protagonists, the Arbitration Committee shared the rice holding out between the two houses and the Ex-parte Applicant. The 1<sup>st</sup> wife was given 1.5 acres and the 2<sup>nd</sup> house was given 1.5 acres while the Ex-parte Applicant remained with one (1) acre. The rice holding was therefore shared out equitably between the family members of the Ex-parte Applicant.

### **Whether orders of prohibition can issue?**

The issue on prohibition was dealt at length in the case of **Kenya National Examination Council** (supra) where the Court of Appeal also had this to say:

***“What does an ORDER OF PROHIBITION DO AND WHEN WILL IT ISSUE? ..... It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction in contravention of the laws of the land. It lies not only for excess of jurisdiction or absence of it but also for a departure from the rules of Natural Justice. It does not however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings”.***

My understanding of the prayers being sought by the Ex-parte Applicant is to prohibit the Respondents from in any way unlawfully altering the ownership records of the rice holding in dispute. An order of prohibition looks into the future and its aim is to stop a wrong from being committed or the continuation of such a wrong. The respondents have already made a decision by sub-dividing the rice holding in question

to the interested parties. The tenant cards and licences have also been issued and therefore nothing remains to be prohibited. The horse has already boded so to speak. The application brought by way of Notice of Motion dated 18<sup>th</sup> December 2015 lacks merit and the same is hereby dismissed. The Ex-parte Applicant shall bear the costs of this suit.

***READ, DELIVERED and SIGNED in open Court at Kerugoya this 4<sup>th</sup> day of October, 2019.***

**E.C. CHERONO**

**ELC JUDGE**

**4<sup>TH</sup> OCTOBER, 2019**

*In the presence of:*

- 1. Ms Wambui holding brief for Maina Kagio*
- 2. Mr. Asimwe holding brief for Bwonwonga for the 2<sup>nd</sup> & 3<sup>rd</sup> Interested parties*
- 3. Mr. Wachira – Court clerk*